

1. What is the nature and extent of claimant's injuries? The ALJ in the Award calculated claimant's upper extremity impairments at the level of the arm. Respondent contends the award should be limited to the forearm as claimant's

injuries and disability were at the level of the hand and wrist. Respondent further argues that the functional impairment rating of the treating physician, board certified plastic and reconstructive surgeon John B. Moore, IV, M.D., is the most credible and claimant should be limited to a 10 percent permanent impairment to each upper extremity at the level of the forearm. Claimant argues that the Award of the ALJ should be affirmed.

2. Did the ALJ err in awarding claimant penalty interest pursuant to K.S.A. 44-512b due to respondent's failure to timely pay any portion of the award? Respondent contends the ALJ failed to allow a hearing as is required by the statute. Respondent further contends that the disability of claimant from these injuries was always in dispute and, therefore, no interest penalty would be proper.

FINDINGS OF FACT

Claimant began working for respondent on February 20, 2002, as an assembler. This job required that claimant use his hands and arms on a repetitive basis. Beginning in 2005, claimant began to experience pain in his arms. Claimant's condition began to worsen and in 2007, claimant advised that he needed medical attention. Claimant was referred to Dr. Moore on August 21, 2007, and was diagnosed with bilateral carpal tunnel syndrome and left long finger trigger finger. Dr. Moore performed surgery on claimant on October 25, 2007, consisting of a left carpal tunnel release with a release of the left long finger. On January 31, 2008, Dr. Moore performed a right carpal tunnel release. Claimant was returned to work for respondent after the first surgery, with one-handed duty and a lifting restriction of 5 to 10 pounds. Claimant was assigned duties as an inspector. After the second surgery, claimant was returned to work with the same restrictions and same job duties as an inspector.

Claimant was last examined by Dr. Moore on June 10, 2008. At that time, claimant still had some soreness in the palms of his hands, was unable to straighten his left long finger and displayed a loss of grip strength, bilaterally. Claimant underwent a series of tests administered by Dr. Moore's hand therapist. The tests indicated symptom magnification. Until June 10, claimant had not displayed a lack of effort at any time. Based on the grip strength testing performed on June 10, 2008, claimant's impairment would have been at the moderate level. This would result in a 20 percent impairment to each upper extremity, pursuant to the fourth edition of the *AMA Guides*.¹ However, with the symptom magnification findings, Dr. Moore reduced the impairment levels to 10 percent to each upper extremity. Dr. Moore was asked if the impairment reduction was pursuant to the fourth edition of the *AMA Guides*. He testified that it was his habit to cut the rating

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

by 50 percent when symptom magnification was found. But, it was not due to any guidance or instruction from the fourth edition of the *AMA Guides*. It was just something he had been doing for 30 years.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on July 15, 2008. Dr. Prostic's diagnosis nearly mirrored that of Dr. Moore. Claimant reported soreness of each palm with weakness of grip, numbness of the right long finger, an inability to straighten the left long finger since the surgery and pain with gripping. Claimant displayed no inconsistencies with any of the tests performed. Dr. Prostic also failed to identify symptom magnification during the testing. Claimant was rated at 20 percent to the left and right upper extremities pursuant to the fourth edition of the *AMA Guides*.²

The ALJ, noting the conflicting medical opinions in the record, referred claimant for an independent medical evaluation (IME) to board certified orthopedic surgeon Terrence Pratt, M.D., on January 5, 2009. Claimant reported numbness in the thumb and middle finger and tingling in the right hand. There was also occasional tingling involving the index and middle fingers of the left hand. There was also burning in both wrists noted on a pain diagram completed by claimant. When claimant was asked to complete a grip and pinch strength test, Dr. Pratt noted abnormal findings, with the inconsistency indicating symptom magnification. Dr. Pratt went on to rate claimant at 20 percent functional impairment of the left upper extremity and 19 percent functional impairment of the right upper extremity, pursuant to the fourth edition of the *AMA Guides*.³ He did not address causation in his opinion.

The ALJ, in the Award, determined that the opinion of Dr. Pratt was the most persuasive and awarded claimant a 20 percent impairment of the left upper extremity at the level of the arm and 19 percent impairment of the right upper extremity at the level of the arm. The ALJ also awarded claimant interest as a penalty under K.S.A. 44-512b. The parties stipulated that there was no mention of a K.S.A. 44-512b action at the time of the regular hearing and that statute is not mentioned in either submission letter to the ALJ. The issue of a K.S.A. 44-512b penalty was originated by the ALJ in the Award.

² *AMA Guides* (4th ed.).

³ *AMA Guides* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁶

Functional impairment opinions have been provided by three health care providers. All three reached nearly identical opinions as to the impairment suffered to claimant's upper extremities. While a question has been raised with two of the opinions as to the extent of claimant's post-treatment efforts, only one of the opinions was adjusted in response to those indications of symptom magnification. Dr. Moore testified that he had a 30-year policy of reducing functional impairments by 50 percent when clear indications of symptom magnification were found in the medical examinations. Dr. Moore acknowledged that there was no justification in the *AMA Guides* for this reduction. It was simply a policy he had followed in his practice for a very long time. The Kansas Supreme Court, in *Bergstrom*,⁷ has made it clear that plain statutory language is to be followed in determining workers compensation matters. K.S.A. 44-510e makes it clear that functional impairment determinations are to be based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. As Dr. Moore acknowledged that his policy of reducing functional impairments is not based upon the *Guides*, this policy is in violation of K.S.A. 44-510e and must be rejected. This leaves Dr. Moore's original opinion of 20 percent to each extremity, Dr. Prostic's opinion of 20 percent to each upper extremity and Dr. Pratt's opinion of 20 percent to the left upper extremity and 19 percent functional impairment to the right upper extremity as the rating

⁴ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-510e(a).

⁷ *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

choices in this matter. The ALJ found the neutral opinion of the court-appointed examiner, Dr. Pratt, as the most credible. The Board agrees. While Dr. Moore was the treating physician, his policy casts doubt on his opinion. Dr. Prostic, being claimant's expert of choice, cannot be seen as neutral. This leaves Dr. Pratt as the most credible. The Board adopts the findings of the ALJ and awards claimant a 19 percent functional disability to his right upper extremity and a 20 percent functional disability to claimant's left upper extremity.

Next, the Board must determine the level of the upper extremity to be used in calculating this award. The ALJ awarded claimant upper extremity impairments at the level of the arm. This utilizes 210 weeks to calculate the award. However, claimant's testimony discusses only his fingers, hands and wrists. There is no evidence in this record that identifies any impairment at or above the level of the forearm. K.S.A. 44-510d limits an award to the forearm to the 200-week level. "It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available in this state."⁸ Here the situs of claimant's disability goes no higher than claimant's wrist. Therefore, under K.S.A. 44-510d, the award will be calculated at the 200-week level of the forearm. The Award of the ALJ will be modified accordingly.

The Board must next consider the award of penalties by the ALJ.

K.S.A. 44-512b(a) states:

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

The issue of a penalty under the above statute was not raised at the time of the regular hearing and no argument on that issue is contained in either submission letter to the ALJ. The issue was unilaterally raised and determined by the ALJ at the time of the Award. At oral argument to the Board, the parties stipulated that no hearing had been held on the issue prior to the Award. The Board has addressed this same issue on several

⁸ *Bryant v. Excel Corp.*, 239 Kan. 688, Syl. ¶ 1, 722 P.2d 579 (1984); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

occasions in the past. In *Mutziger*,⁹ *Smothers*¹⁰ and *Beaver*,¹¹ the Board addressed the application of K.S.A. 44-512b and the procedures required to implement its penalties. The statute requires that a hearing be conducted pursuant to K.S.A. 2007 Supp. 44-523 before penalties may be assessed. The parties agreed that no hearing occurred in this matter. The case was submitted and the issue of penalties was raised by the ALJ on his own. In essence, the ALJ determined an issue not itemized at the Regular Hearing, not addressed by either party in their submission letters to the ALJ and without the benefit of a hearing. This violates the due process requirements set forth in K.S.A. 44-512b. As such, the assessment of penalties by the ALJ must be reversed and set aside.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the functional disability awarded to claimant for the injuries to his upper extremities, but modified with regard to the calculation of those awards. The assessment of penalties under K.S.A. 44-512b is reversed and set aside.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated August 5, 2009, should be, and is hereby, affirmed as to the 19 percent functional disability to claimant's right upper extremity and the 20 percent functional disability to claimant's left upper extremity, but modified to calculate both awards at the level of the forearm under K.S.A. 44-510d. The assessment of penalties under K.S.A. 44-512b is reversed and set aside.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary M. Hayes, and against the respondent, SPX Cooling Technologies, Inc., and its insurance carrier, Ace American Insurance Company, for an accidental injury which occurred on October 25, 2007, and based upon an average weekly wage of \$688.99.

⁹ *Mutziger v. Homier Distribution Company*, No. 1,018,165, 2008 WL 4763706 (Kan. WCAB Sept. 29, 2008).

¹⁰ *Smothers v. Transervice Logistics, Inc.*, No. 1,039,301, 2009 WL 2864502 (Kan. WCAB August 11, 2009).

¹¹ *Beaver v. Brown Cargo Van, Inc.*, No. 1,039,849 & 1,039,850, 2009 WL 3710746 (Kan. WCAB October 28, 2009).

Right Upper Extremity

Claimant is entitled to 38 weeks permanent partial disability compensation at the rate of \$459.35 per week or \$17,455.30 for a 19 percent permanent partial disability to the right upper extremity at the level of the forearm. As of the date of this award, this entire amount is due and ordered paid in one lump sum, minus any amounts already paid.

Left Upper Extremity

Claimant is entitled to 40 weeks permanent partial disability compensation at the rate of \$459.35 per week or \$18,374.00 for a 20 percent permanent partial disability to the left upper extremity at the level of the forearm. As of the date of this award, this entire amount is due and ordered paid in one lump sum, minus any amounts already paid.

IT IS SO ORDERED.

Dated this ____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Clark H. Davis, Attorney for Claimant
Mark C. Beam-Ward, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge